PREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1196

ELIZABETH LEWIS HOSACK, et al.,
Appellants,

vs.

JOSEPH R. SMILEY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM OR DISMISS

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Appellees in the above-entitled action move to dismiss or affirm on the grounds that the appeal does not present questions so substantial as to require further argument and that appellants have no standing to raise certain of the issues they present on appeal.

ARGUMENT

1. The issues of substantive due process and freedom of speech presented in questions 1 and 3, respectively, are not so substantial as to require further argument.

Identical issues were raised and disposed of in a manner directly contrary to appellants' position here in *Knight* v. *Board of Regents*, 269 F.Supp. 339 (1967), Aff'd (per curiam) 88 S.Ct. 816, 19 L.Ed.2d 812 (1968).

In addition the Court has voiced approval of simple oaths of minimal loyalty to the government on several other occasions. *American Communication Ass'n* v. *Douds*, 339 U.S. 382, 415 (1950); *Bond* v. *Floyd*, 385 U.S. 116, 132 (1966).

2. Appellants have no standing to raise the issue of procedural due process as presented in question 2.

The record below shows, on its face, that none of the appellants have, in fact, been discharged from employment by the University of Colorado for refusal to take the loyalty oath or for noncompliance with its terms. Neither have any of the appellants requested a hearing or been denied a hearing.

The question of a hearing remains hypothetical and contingent. It has long been the Court's practice "not to decide abstract, hypothetical or contingent questions." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945). *See also, Giles* v. *Harris*, 189 U.S. 475, 486 (1903); *Texas* v. *Interstate Commerce Comm'n*, 258 U.S. 158 (1922); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324 (1936); *New York* v. *Illinois*, 274 U.S. 488 (1927); *Arizona* v. *California*, 283 U.S. 423 (1931).

3. The factual basis of question 4 is inadequate to support further argument.

Appellants contend that if they were required to take the oath in question, they would be denied equal protection of the laws, as guaranteed by the Fourteenth Amendment, by virtue of the fact that employees of other Colorado institutions are not required to take similar oaths.

As appears in the record below, the University of Colorado is governed by the Board of Regents of the University of Colorado, a body which is constitutionally vested with very broad powers. COLO. CONST., Art. IX, §§ 12-14, which provides as follows:

> *Section 12. Regents of university.*—There shall be elected by the qualified electors of the state, at the first general election under this constitution, six regents of the university, who shall immediately after their election be so classified by lot, that two shall hold their office for the term of two years, two for four years and two for six years; and every two years after the first election there shall be elected two regents of the university, whose term of office shall be six years. The regents thus elected and their successors, shall constitute a body corporate to be known by the name and style of "The Regents of the University of Colorado."
>
> *Section 13. President of university.*—The regents of the university shall, at their first meeting, or as soon thereafter as practicable, elect a president of the university, who shall hold his office until removed by the board of regents for cause; he shall be ex officio, a member of the board, with the privilege of speaking, but not voting, except in cases of a tie; he shall preside at the meetings of the board, and be the principal executive officer of the university, and a member of the faculty thereof.

> *Section 14. Control of university.*—The board of regents shall have the general supervision of the university, and the exclusive control and direction of all funds of, and appropriations to, the university.

These powers have been more specifically defined in the following cases: *In re Mackey's Estate,* 46 Colo. 79, 102 P. 1075 (1909); *People ex rel. Jerome* v. *Board of Regents,* 24 Colo. 175, 49 P. 286 (1897); *Burnside* v. *Board of Regents,* 100 Colo. 33, 64 P.2d 1271 (1937); *Sigma Chi Fraternity* v. *Board of Regents,* 288 F.Supp. 515 (D.C. Colo. 1966); *Buttny, et al.* v. *Smiley, et al.,* Civil No. C-666 (D.C. Colo., Feb. 14, 1968).

If the Board of Regents, as an employer, were required to treat all its employees exactly as employees of all other state agencies are treated, its constitutionally vested powers would become meaningless. The Colorado Constitution created a potential "class" of employees of the University of Colorado in creating the University and its governing body. The Regents have simply directed that that class be administered an oath.

It is clearly settled that any classification adopted by a state, in the exercise of its legitimate ends, which classification has a reasonable basis and is not arbitrary will be sustained against an attack based upon the equal protection clause of the Fourteenth Amendment. *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U.S. 129, 137 (1921); *Watson* v. *Maryland,* 218 U.S. 173 (1910); *Bachtel* v. *Wilson,* 204 U.S. 36, 41 (1907); *Smith* v. *Cahoon,* 283 U.S. 553, 566-67 (1937); *Landwehr* v. *Regents of University of Colorado,* 156 Colo. 1, 396 P.2d 451 (1964).

Since the classification involved herein was not made by the Regents but by the Colorado Constitution, appel-

lants' attack on the basis of the Fourteenth Amendment guarantee of equal protection amounts to a collateral attack on the Constitution of the State of Colorado. This attack cannot be sustained unless the Court is of the opinion that it is an arbitrary and unreasonable classification for a state constitution to create a special governing body for the state university.

4. The factual basis of question 5 is inadequate to support further argument.

The record below indicates that all the appellants were hired by the University of Colorado prior to the date the Regents adopted the presently contested oath on February 17, 1967. Inasmuch as the prior oath was not invalidated until April 24, 1967, *Gallagher* v. *Smiley*, 270 F.Supp. 86 (D.C. Colo. 1967), appellants were all hired while that oath was in effect and either subscribed to it or had knowledge that it was a condition of employment. Since the new oath is a verbatim duplication of the first sentence of the old oath, the former requires nothing of appellants which was not required as a condition of their original employment. Therefore, there can logically be no impairment of their contractual rights.

CONCLUSION

In the five questions presented in appellants' Jurisdictional Statement there are no issues raised which require further argument in view of prior decisions of the Court,

lack of standing and insufficient factual basis. Therefore, appellees' Motion to Affirm or Dismiss should be granted.

Respectfully submitted,

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